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Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Austrian National Report

Michael Mayrhofer, Member of the Constitutional Court of the Republic of Austria

I. Non-justiciable questions and deference intensities

1. In your jurisdiction, what is meant by "judicial deference"?

The term "judicial deference" (*richterliche Selbstbeschränkung*) itself is not found in the case law of the Austrian Constitutional Court. A concept commonly found in the Constitutional Court's rulings which (today) most closely corresponds to the meaning of judicial deference to the legislator[1], or judicial self-restraint, is that of "margin of appreciation" (*rechtspolitischer Gestaltungsspielraum*), although the gradual emergence of this doctrine from the end of the 1970s saw the Court turn away from the previously stronger deferential nature of its fundamental rights case law towards the legislator[2].[3]

"Margin of appreciation" here refers to the legislative powers a territorial entity has within the given constitutional limits and the related decreased intensity of judicial review.[4] Its initial outlines were drawn by the Constitutional Court in a judgment in 1978, in which it held that[5] the legislator has legislative freedom (*rechtspolitische Gestaltungsfreiheit*), though this is of course not unlimited. This legislative freedom applies both to the objectives pursued and the selection of the means to be used to achieve those objectives. In general, the legislator is free to decide which instruments it considers suitable for achieving the objectives and which means it selects from those available and subsequently applies. According to the 1978 judgment, the Constitutional Court can oppose the legislator only if, in determining the means to be used, the legislator exceeds the limits imposed by the Constitution.

Although the concept of margin of appreciation was developed in the context of the principle of equality (Article 7 paragraph 1 of the Constitution [*Bundes-Verfassungsgesetz, B-VG*]), it is

[1] This report primarily discusses the powers of the Constitutional Court (*Verfassungsgerichtshof, VfGH*) to review laws (Article 140 of the Constitution [*Bundes-Verfassungsgesetz, B-VG*]) and general-abstract regulations (*Verordnungen*) imposed by administrative authorities (Article 139 of the Constitution). The powers of the Constitutional Court with regard to its powers to rule on complaints against judgments and decisions of administrative courts (Article 144 of the Constitution), referred to as *Sonderverwaltungsgerichtsbarkeit*, are addressed only in exceptional cases. The other powers of the Constitutional Court shall remain out of consideration in this report.

[2] Cf. *Heller*, Judicial self-restraint in der Rechtsprechung des Supreme Court und des Verfassungsgerichtshofes, ZÖR 1988, 89 (especially 113 *ff*); *Eberhard*, Judicial activism und judicial self restraint in der Judikatur des VfGH, in Bernat/Grabenwarter et al. (eds.), Festschrift Christian Kopetzki zum 65. Geburtstag (2019) 141 (143 *ff*); see also below: 23 to 25.

[3] Cf. *Dopplinger/Mörth*, Rechtspolitischer Gestaltungsspielraum des Gesetzgebers und Margin of Appreciation: zwei Seiten einer Medaille?, JRP 2022, 240 (242 *ff*).

[4] Cf. *Dopplinger/Mörth*, Gestaltungsspielraum 242, 261.

[5] Selected decisions of the Constitutional Court of the Republic of Austria (*VfSlg.*) *8457/1978*.

crucial today for the Constitutional Court's fundamental rights case law as a whole[6] and over time has undergone dynamic development,[7] resulting in a spectrum of deference (see Question 2.).

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

a. In general, all parts of the Constitution are justiciable. Correspondingly, the "supreme democratic function" of the Constitutional Court is to impose an "act of increased democratic legitimacy", i.e. the Constitution, on the legislator and review compliance therewith.[8] No limitation on the performance of the functions of the Constitutional Court by reason of the "political dimension of a constitutional dispute" can be inferred from the case law.[9] In line with its role in a democratic state under the rule of law, the Constitutional Court does not limit itself in its rulings to the "supervision of apolitical positions" and accordingly does not exercise overall judicial deference regarding "politically relevant questions".[10] The Court's case law over recent years has included cases concerning matters of moral controversy such as reproductive medicine,[11] assisted suicide,[12] digital technologies (electronic voting,[13] data retention,[14] surveillance by the state using trojans[15]), questions relating to family law such as same-sex marriage,[16] the entry of a "third gender" in the civil register[17] and parental custody,[18] or questions with significant budgetary consequences, such as those arising in connection with the financial assistance provided during the COVID-19 pandemic.[19]

b. The standard of review, and hence the degree of deference, varies firstly according to the jurisdiction of the Constitutional Court (see also Question 3.) and also depends to a great extent

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[6] Cf. on the development of case law *Korinek*, Entwicklungstendenzen in den Grundrechtsjudikatur des Verfassungsgerichtshofes (1991); *Dopplinger/Mörth*, Gestaltungsspielraum 243 *ff*; examples of case law are *VfSlg. 12.103/1989, 14.301/1995* and *20.483/2021, 20.509/2021* (concerning the margin of appreciation regarding Article 8 ECHR), *14.263/1995, 20.0523/2021* and *VfGH 20.6.2022, G 279/2021* (margin of appreciation in context with Article 1 1. Additional protocol to the ECHR) as well as *14.260/1995, 16.911/2003* and *VfGH 8.3.2022, E 3120/2021* (in each case based on the margin of appreciation in conjunction with Article 10 ECHR).

[7] *Dopplinger/Mörth*, Gestaltungsspielraum 245.

[8] *Oberndorfer*, Demokratie und Verfassungsgerichtsbarkeit in Österreich, in: Holoubek et al. (eds.), Dimensionen des modernen Verfassungsstaates, Symposium zum 60. Geburtstag von Karl Korinek (2002) (105) 106 *f*; see also Korinek, Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, in: Korinek, Grundrechte und Verfassungsgerichtsbarkeit (2000) 243 (274).

[9] Cf. *Oberndorfer*, Demokratie 106; recently *Eberhard*, Judicial activism 150: The Constitutional Court is "– often contrary to the wording – willing […] to correct clear value judgments of the law, an unambiguous example of judicial activism"; for a similar view see *Berka*, Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich (1999), point 142.

[10] Cf. *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 106 f.

[11] *VfSlg. 15.632/1999, 19.824/2013*, and *VfGH 30.6.2022, G 230/2021*.

[12] *VfSlg. 20.433/2020*.

[13] *VfSlg. 19.592/2011*.

[14] *VfSlg. 19.702/2012*.

[15] *VfSlg. 20.356/2019*.

[16] *VfSlg. 20.225/2017*.

[17] *VfSlg. 20.258/2018*.

[18] *VfGH 9.3.2023, G 223/2022*.

[19] As of the time of preparing this report, the proceedings relating to this matter were pending before the Constitutional Court under case number *G 265/2022*.

on the area of constitutional law concerned, particularly as there are considerable differences in the case law of the Constitutional Court as regards interpretation of constitutional law.[20] Discussion in this report of the margin of appreciation (*rechtspolitischer Gestaltungsspielraum*) in particular focusses on fundamental rights jurisprudence. The Constitutional Court does not grant the legislator a comparable margin in other areas of constitutional law. For example, the constitutional principle of the rule of law is increasingly specified in more detail in areas ranging from the question of the rule-of-law conditions under which fully automated individual administrative decisions (*Bescheide*) are permitted[21] through to the legal protection required under the rule of law against administrative notices (especially in the field of financial market law)[22].[23] The case law also derives detailed constitutional requirements e.g. from the principles of suffrage,[24] without entirely depriving the legislator of the margin of appreciation.[25]

c. The scope of the margin of appreciation varies. In certain areas such as the law on employment, remuneration and pensions for public employees,[26] fiscal equalization arrangements between the territorial entities,[27] the law regarding taxation[28] and benefits[29], as well as in matters of private law (e.g. some family and succession law matters[30] and tenancy matters[31]) the Constitutional Court expressly grants the legislator not just a margin of appreciation, but a "wide margin of appreciation". The reasons for this extended margin have to do with the nature of the individual subject matters. For instance, the question of whether the state is legislating on its "own" matters, as in the case of the law relating to public employees, plays a role. As regards fiscal equalization, the necessarily "cooperative" approach when adopting the law to represent

[20] *Grabenwarter*, § 102. Der österreichische Verfassungsgerichtshof, in Bogdandy/Grabenwarter/Huber (eds.), Handbuch Ius Publicum Europaeum. Band IV, point 69 *f.*

[21] VfSlg. 11.590/1987 (computer-assisted administrative decisions); recently *Mayrhofer* in Mayrhofer/Parycek, Digitalisierung des Rechts – Herausforderungen und Voraussetzungen, 21. ÖJT Band IV/1, 77 *ff.*

[22] *VfSlg. 20.238/2018* (duty to issue warnings of the financial market supervisory authority).

[23] Cf. also e.g. *VfSlg. 12.683/1991* (premature enforceability of employee claims), *16.772/2002* (exclusion of appeal against extraditions), *17.018/2003* (power to adopt regulations for the extension of adjustment periods of landfills), *20.239/2018* (general exclusion of the suspensive effect in the case of penalties), *20.345/2019* (public broadcaster [*ORF*] broadcasting rights).

[24] Cf. *VfSlg. 18.215/2007, 18.551/2008, 20.306/2019* (universal suffrage); *VfSlg. 19.982/2015, 15.616/1999* (equal suffrage); *VfSlg. 10.412/1985, 14.440/1996, 19.893/2014, 20.071/2016* (personal suffrage); *VfSlg. 13.839/1994, 18.603/2008, 20.071/2016, 20.128/2016, 20.273/2018*; *VfGH 15.6.2023, W I 4/2023* (free suffrage); *VfSlg. 8694/1979, 10.412/1985, 19.893/2014, 20.071/2016, 20.242/2018* (secret suffrage); VfSlg. 8321/1978, 8700/1979, 19.782/2013, 19.820/2013, 20.417/2020, 20.439/2021; *VfGH 1.3.2023, W I 12/2022*; *15.6.2023, W I 1/2023* (proportional representation).

[25] Cf. on the legislator's margin regarding the proportional electoral system, *VfGH 1.3.2023, W I 12/2022; 15.6.2023, W I 1/2023*.

[26] Cf. e.g. *VfSlg. 9607/1983*; *VfGH 17.6.2022, G 397/2021*; *1.7.2022, G 17/2022*.

[27] Cf. e.g. *VfSlg. 12.505/1990, 19.032/2010, 19.562/2011, 19.984/2015*; *VfGH 26.9.2014, B 1504/2013* and others; *23.2.2015, G 220/2015*.

[28] Cf. e.g. *VfSlg. 19.411/2011, 19.984/2015, 20.287/2018, 20.462/2020, 20.518/2021*.

[29] Cf. e.g. *VfSlg. 5972/1969, 8605/1979, 18.638/2008, 19.999/2015, 20.199/2017*.

[30] Cf. e.g. *VfSlg. 12.103/1989, 14.301/1995, 20.018/2015, 20.032/2015, 20.130/2016, 20.496/2021*.

[31] Cf. e.g. *VfSlg. 20.077/2016, 20.089/2016, 20.179/2017, 20.180/2017*.

the mutual agreement of the territorial entities on the allocation of resources is decisive.[32] In matters of private law, the legislator's duty to balance different interests is relevant. When legislating on matters relating to the law of tenancy, and in particular where provisions governing rents are concerned, the legislator must "balance partly conflicting housing, social, and urban development policy interests".[33] As regards parental custody, the Constitutional Court additionally emphasizes the need for a scientific foundation of legal provisions, as this is an "area of legislation which is frequently characterized by decision-making situations in an environment of problematic relationships, of special protection to be afforded to involved minors, and of complex expert assessments in the field of (child) psychology".[34]

However, there are also some decisions in which the Constitutional Court explicitly denies a wide margin of appreciation for the legislator. For example, in *VfSlg. 20.433/2020*, the Court held that the prohibition of any form of assisted suicide (provided for in section 78 of the Criminal Code [*Strafgesetzbuch, StGB*]) is unconstitutional because it violates the individual's constitutional right to self-determination: "As the provision of section 78 (second case) StGB concerns the existential decision on how to live and die and, thus, essentially affects the individual's right to self-determination, the margin of appreciation by the legislator is not wide at all."

Finally, there are situations in which the Constitutional Court refers to a wide or less wide margin depending on the specific situation. Regarding in particular the fundamental right to engage in gainful activity (Article 6 of the Basic State Law [*Staatsgrundgesetz, StGG*]), the Court differentiates between provisions governing exercise of a profession or occupation and those relating to entry into a profession or occupation, finding that the legislator has a greater margin of appreciation in the former case than in the latter.[35]

d. In proceedings for review of the constitutionality of regulations under Article 139 of the Constitution, the Constitutional Court assumes that the administrative authorities have a broad discretionary power when enacting regulations in situations such as the following:

One reason for according a broad discretionary power is related to the legislator's regulatory approach. Based on a judgment referred to as the "*Perchtoldsdorfer Erkenntnis*",[36] the Constitutional Court has recognized the specific character of administrative planning: the principle of legal decision-making that specific circumstances always entail a specific legal consequence ("conditional programming") largely does not apply and a purely target-oriented approach prevails, i.e. decisions are made only with regard to certain planning objectives to be achieved ("final programming").[37] This (merely) target-oriented programming of regulations governing administrative planning provides for a wider (planning) margin. This is not associated with any

[32] Cf. *VfSlg. 12.505/1990:* "An appropriate system of financial equalization complying with the requirement set out in section 4 of the Constitutional Law on Public Finance (*Finanz-Verfassungsgesetz, F-VG)* 1948 requires and presupposes cooperation between the territorial authorities characterized by political insight and mutual consideration already at the pre-legislative stage. […] Therefore, consultation between the representatives of the territorial authorities prior to adoption of the Fiscal Equalization Act *(Finanzausgleichsgesetz)* is indispensable […]. If the negotiations result in agreement, at least on the essential and fundamental aspects, it can usually be assumed that an overall arrangement compliant with Article 4 of the Fiscal Equalization Act 1948 has been reached."
[33] *VfSlg. 20.179/2017.*
[34] *VfSlg. 20.018/2015.*
[35] *VfSlg. 11.558/1987, 11.625/1988, 20.090/2016, 20.248/2018* and many others.
[36] *VfSlg. 8280/1978.*
[37] For more detail, cf. *Leitl-Staudinger/Mayrhofer*, Innovation in der Verwaltungsrechtswissenschaft am Beispiel des Planungsrechts, in Wirth et al. (eds.), 50 Jahre Johannes Kepler Universität Linz (2017) 165 (168 *ff*).

abandonment by the Constitutional Court of its judicial review powers, but with a shifting emphasis of the review because the Constitutional Court requires the legislator to set precise procedural rules for the enactment of regulations ("procedural legitimation") and places particular focus on this in the individual case.[38] This means that the limited review of planning within the scope of substantive law is – in a manner that is both required and sufficient under the rule of law– replaced by a review of adherence to planning procedure.[39]

This case law, originally established in relation to the law governing the planning of land use,[40] has become a landmark in other areas of judicial decision-making in which, due to the nature of the subject matter concerned, the legal basis for administrative action is based on a target-oriented approach.[41] In those cases, the basis on which the administrative authority made its decisions usually needs to be established in great detail. The Constitutional Court reviews whether this was adequately done prior to enactment of the regulation;[42] nevertheless, in proceedings for review of a regulation relating to electricity system charges, the Court found that it was not its duty to obtain expert opinions or verify expert statements in detail or weigh such opinions and statements against one another.[43] The Court takes a similar approach when reviewing regulations which require the authority enacting the regulation to strike a balance in decision-making on the basis of expert knowledge, as in the case of traffic restrictions in road traffic law.[44]

Based on the foregoing, a broader discretionary power can be generally assumed in the field of administration in cases in which regulatory provisions are required to be established on the basis of scientific or expert assessment. One particular context in which the Constitutional Court allowed an essentially wide margin to the regulator, i. e. the authority enacting regulations, was in relation to measures to contain the COVID-19 pandemic, e.g. prohibitions on entering and staying in certain places, leaving (one's own) home, or on engaging in certain activities, including gainful work:

The Constitutional Court found that the legislator, in a manner which in itself was constitutionally unobjectionable, conferred on the Federal Minister for Health a "discretion to decide on estimate and forecasts" on "whether and in how far restrictions on fundamental rights, including substantial ones, are deemed necessary to prevent the spread of COVID-19", with the administrative authority enacting the regulation having to base its decision on "a weighing of the relevant interests of the people concerned which are protected by fundamental rights. The administrative authority enacting the regulation must therefore with regard to the level and spread of COVID-19 and necessarily on the basis of forecasts assess in how far the envisaged prohibitions are measures that are appropriate [...], necessary [...] and adequate [...]." Nevertheless, the Constitutional Court requires the administrative authority enacting the regulation, in view

[38] Cf. e.g. *VfSlg. 12.687/1991, 14.941/1997, 17.854/2006, 19.126/2010, 19.985/2015, 20.251/2018, 20.357/2019*.
[39] *Oberndorfer*, Strukturprobleme im Raumplanungsrecht, Die Verwaltung 1972, 257 (271 f.).
[40] Cf. VfSlg. 8280/1978 as well as e.g. VfSlg. 10.711/1985, 12.926/1991, 17.057/2003, 17.224/2004, 20,081/2016.
[41] See e.g. *VfSlg. 17.348/2004, 18.453/2008, 19.700/2012* (in each case regarding energy law), *VfSlg. 20.399/2020* (regarding the epidemic law), *17.101/2004* (concerning the law on the organization of higher education institutions), *17.232/2004* (regarding hospital law), *14.256/1995* (concerning media law), *19.126/2010* (regarding road law) as well as *17.854/2006, 19.305/2011* (in each case concerning environmental protection law).
[42] Cf. e.g. *VfSlg. 11.972/1989, 17.161/2004, 20.095/2016, 20.398/2020*.
[43] *VfSlg. 17.517/2005*.
[44] Cf. e.g. *VfSlg. 13.449/1993, 17.573/2005, 18.579/2008, 18.766/2009*; *VfGH 18.9.2014, V 38/2014*; *24.11.2016, V 147/2015; 11.12.2019, V 74/2019*; *14.12.2022, V 177/2022* and others; *28.2.2023, V 102/2022* and others.

of its "far-reaching authorization", "to show how it exercised its margin of decision-making in light of the statutory objectives by recording, during the adoption procedure, the information basis concerning the relevant legal criteria which is used as the basis for its decision to adopt the regulation and the statutory weighing of interests". Therefore, the Court reviews whether the foundations on which the decision to establish a COVID-19 measure was taken were adequately documented "in the files",[45] but does not scrutinize the administrative authority enacting the regulation's "information basis" from a scientific or technical perspective.

3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?
4. Are there situations when your Court deferred because it had no institutional competence or expertise?

a. The Constitutional Court must limit itself to the powers exhaustively conferred on it under the Constitution (cf. in particular Articles 137 to 145 of the Constitution).[46] Specifically as regards the power to review the constitutionality of laws,[47] it should be noted that the Constitutional Court rules exclusively on the unconstitutionality of formal laws adopted at the federal or regional level (Article 140 paragraph 1 of the Constitution). Publications to correct typographical errors in the official gazette[48] or "simple" parliamentary decisions such as those to ratify international treaties[49] or hold referendums or plebiscites are not deemed laws in this regard.[50] A similar distinction is made regarding the Constitutional Court's power to review the lawfulness of regulations adopted by administrative authorities in accordance with Article 139 paragraph 1 of the Constitution. For example, merely "internal" provisions (administrative regulations [*Verwaltungsverordnungen*] or decrees [*Erlässe*]) are not subject to review by the Court[51] unless they (exceptionally) have external effect and therefore (for considerations relating to the rule of law) are regarded as legal regulations within the meaning of Article 139 paragraph 1 of the Constitution.[52]

In accordance with Article 144 paragraph 1 of the Constitution, the Constitutional Court rules on judgments (and decisions) of the administrative courts "where complainants allege an infringement by the judgment of a constitutionally guaranteed right or infringement of their rights by reason of application of an unlawful regulation, an unlawful publication regarding the republication of the consolidated text of a law (international treaty), an unconstitutional law or an unlawful international treaty." The Constitutional Court's standard of review in the former case is in principle limited to dealing with shortcomings which extend into the constitutional sphere, while the Supreme Administrative Court (*Verwaltungsgerichtshof, VwGH*) has to deal

[45] *VfSlg. 20.399/2020*; as well e.g. *VfSlg. 20.458/2020, 20.521/2021*; *VfGH 29.6.2023, V 143/2021*.
[46] Cf. in more detail on the above *Grabenwarter*, Verfassungsgerichtshof, point 53 *ff.*
[47] *Öhlinger/Eberhard*, Verfassungsrecht[13] (2022), point 984.
[48] *VfSlg. 16.327/2001*.
[49] *VfSlg. 18.576/2008*.
[50] *VfSlg. 8370/1978*.
[51] Cf. e.g. *VfSlg. 12.581/1990, 13.635/1993; 13.784/1994; 17.644/2005, 18.929/2009*.
[52] Cf. e.g. *VfSlg. 8647/1979, 8648/1979, 8807/1980, 9416/1982, 10.170/1984, 10.607/1985, 10.728/1985, 11.467/1987, 12.286/1990, 19.230/2010, 20.472/2021*.

with any unlawfulness.[53] In this respect, the Constitutional Court performs (depending on the nature of the fundamental right concerned,[54] but as a general rule) only a kind of "basic review", and reviews serious rights infringements only. However, the question of whether a decision of an administrative court "complies with the law in all respects" (a "detailed review") must (as a general rule) be reviewed by the Supreme Administrative Court.[55] Accordingly, the Constitutional Court usually refuses to deal with complaints concerning judgments of administrative courts which raise only "questions of ordinary statute law", i.e. which do not extend into the constitutional law.[56]

b. General factors that have a "limiting" effect on the powers of review and decision-making of the Constitutional Court[57] are the fundamentally case-specific nature of its case law[58] and the fact that the court is strictly bound by its "own" procedural law (the Constitutional Court Act [*VfGG*][59]) and secondarily (in accordance with Article 35 of the Constitutional Court Act), the Code of Civil Procedure (*Zivilprozessordnung, ZPO*)[60].

Because the Court is thus bound, (even) proceedings for the review of legal norms are structured as contentious proceedings in which the Court must decide only on what was dealt with in proceedings between the parties;[61] as a result of this, the Constitutional Court regards itself as bound by the concerns (raised in an application for review of legal norms or formulated by the Constitutional Court itself in a decision initiating *ex officio* proceedings for review of legal norms).[62] This means that, when reviewing laws and regulations of administrative authorities, the Court must assess only whether the legal norm challenged is unconstitutional or unlawful for the reasons set out in the application.[63] The Constitutional Court is prohibited from addressing any other concerns relating to a law or regulation (no matter if submitted by a party or

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[53] *Kneihs/Rohregger,* Art. 144 B-VG, in Korinek/Holoubek et al. (eds.), Österreichisches Bundesverfassungsrecht, 13. Lfg. (2017), point 5.

[54] In the case of fundamental rights that need to be laid down in more detail in laws (*Ausführungsvorbehalt*), such as the freedom of association and assembly, the Constitutional Court found in its rulings that any breach of ordinary implementing laws constitutes an infringement of the respective constitutionally guaranteed right pursuant to Article 144 paragraph 1 of the Constitution. Beginning with its judgment in *VfSlg 19.818/2013* (right of assembly), the Constitutional Court has departed from this "detailed review" practice in the broad sense described above. In its more recent case law, only decisions which relate to core issues of freedom of assembly (e.g. the prohibition or dispersal of an assembly) or freedom of association (e.g. *VfSlg. 19.818/2013, 19.962/2015, 20.057/2016, 20.261/2018*) fall within its exclusive jurisdiction. Additionally, the Court no longer reviews whether the impugned decision "complies with the law in every respect" (cf. most recently *VfSlg. 19.994/2015, 20.117/2016*). The Supreme Administrative Court now has jurisdiction to carry out a "detailed review" in relation to questions of this kind (*VwGH 27.2.2018, Ra 2017/01/0105*).

[55] Cf. e.g. *Öhlinger/Eberhard*, Verfassungsrecht[13], point 728.

[56] Cf. e.g. *VfGH 23.6.2022, E 3691/2021*; *13.12.2022, E 933/2022*; *15.3.2023, E 3778/2021* and others; *12.6.2023, E 96/2023*.

[57] For more detail, cf. *Korinek*, Verfassungsgerichtsbarkeit 264 *ff*

[58] Cf. e.g. *VfSlg. 17.121/2004, 17.547/2005, 19.657/2012, 20.035/2015, 20.135/2017, 20.341/2019*.

[59] Constitutional Court Act (*Verfassungsgerichtshofgesetz*) 1953 – VfGG, BGBl. 85/1953 idF BGBl. I 88/2023.

[60] Code of Civil Procedure (*Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten*) (Zivilprozessordnung – ZPO), RGBl. 113/1895 idF BGBl. I 77/2023.

[61] *Korinek*, Verfassungsgerichtsbarkeit 265 f.

[62] For proceedings pursuant to Article 139 of the Constitution cf. e.g. *VfSlg. 11.580/1987, 14.044/1995, 16.674/2002*; for proceedings pursuant to Article 140 of the Constitution cf. e.g. *VfSlg 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003, 20.356/2019* as well as *VfGH 15.12.2021, G 233/2021* and others.

[63] For proceedings pursuant to Article 139 of the Constitution cf. e.g. *VfSlg. 15.644/1999, 17.222/2004*; for proceedings pursuant to Article 140 of the Constitution cf. e.g. *VfSlg 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*.

raised by the Court itself). This also applies to concerns which are raised by the applicant in a later stage of proceedings.[64] Accordingly, the scope of repeal accorded to the Court depends on the application: In accordance with the first sentence of Article 140 paragraph 3 and the first sentence of Article 139 paragraph 3 of the Constitution, the Court may repeal a provision only to the extent explicitly requested.

Contrary to this, the Constitutional Court is not similarly bound in proceedings relating to complaints against judgments and decisions of the administrative courts (Article 144 of the Constitution). In this type of proceedings, the Constitutional Court examines *ex officio*, i.e. of its own motion, whether the judgment or decision challenged infringes any constitutionally guaranteed right or whether the rights of the complainant have been infringed by applying an unlawful law or regulation.[65] Thus, the Constitutional Court is not bound by the complainant's submissions in proceedings in accordance with Article 144 of the Constitution.

c. The Constitutional Court accepts a formal limit to its powers of review in the case of national provisions which serve to implement EU law (directives and, where applicable, also decisions). The Court does not review such provisions in light of the (Austrian) Constitution if and to the extent that their substance is determined entirely by EU law, i.e. the national legislator has no leeway of implementation:

"Due to the primacy of EU law, including over national constitutional law (cf. *VfSlg. 16.050/2000*), the repeal of provisions implementing EU law is prohibited if EU law does not grant the national legislator any margin, i.e. the legislator cannot establish a substitute provision which complies with both EU law and national constitutional law".[66]

This case law is therefore relevant if a directive (or a decision of an EU institution) requires implementation of a specific content, but that content conflicts with national constitutional law.[67] If the Constitutional Court has doubts as to the lawfulness (particularly conformity with the Charter of Fundamental Rights of the European Union [CFR]) of the Union legislative act transposed, it submits a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU.[68] This shows the "*remarkable relationship of dialogue*"[69] that the Constitutional Court has entered into with the CJEU.[70]

5. Are there cases where your Court deferred because there was a risk of judicial error?

No.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the

[64] E.g. *VfSlg. 9260/1981, 14.802/1997* with further references.
[65] *VfSlg. 7370/1974*.
[66] *VfSlg. 20.070/2016* (arrest warrant); see also *VfSlg. 18.642/2008*; as well as *VfSlg. 20.209/2017*. In its decision *VfSlg. 19.702/2012*, the Constitutional Court used these considerations in support of admissibility of its request to the Court of Justice of the European Union (CJEU) for a preliminary ruling (dated 28 November 2012) in connection with the provisions on data retention.
[67] Cf. *Holoubek*, Doppelte Bindung und Richtlinienumsetzung, ZÖR 2018, 603 (607).
[68] Cf. VfSlg. 19.702/2012, and *VfSlg. 19.892/2014* (data retention).
[69] *Eberhard*, Judicial activism 149.
[70] See *VfSlg 15.450/1999, 16.050/2000, 16.100/2001, 19.702/2012*.

conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Austria is a representative parliamentary democracy. The legislative bodies are, at the federal level, the National Council (*Nationalrat*) together with the Federal Council (*Bundesrat*) (Article 24 of the Constitution) and, at the regional level, the Regional Parliaments (*Landtage*) (Article 95 paragraph 1 of the Constitution).[71] The National Council is elected directly by the Austrian people (Article 26 of the Constitution) and the Regional Parliaments by the people of the individual regions (*Länder*) (Article 95 paragraph 1 of the Constitution) on the basis of proportional representation. Whenever the case law of the Constitutional Court accords these legislative bodies a margin of appreciation, the Court will (also) implicitly defer, invoking their democratic legitimacy.[72]

Nevertheless, it should be noted here that constitutional laws (and constitutional provisions contained in ordinary laws) can be adopted only if a qualified majority of members are present and by qualified majority of the votes cast (Article 44 paragraph 1 of the Constitution). In light of this, the Austrian legal literature[73] has made it clear that, politically speaking, the greater preservation accorded to questions of a substantive legal nature when they attain constitutional status serves to protect the qualified minority against the simple absolute majority. Therefore, it is even more important that the Constitutional Court – in particular for democratic reasons – does not neglect its duty to monitor compliance of justiciable legal norms with the Constitution. The Court would not do justice to its role in a democratic state under the rule of law if – for reasons of misconceived judicial self-restraint – it were to limit itself to the supervision of apolitical positions.

A key consideration when demarcating the role of the Constitutional Court vis-à-vis that of the parliamentary legislator is the fact that the Court can only act as what is referred to as a "negative legislator" in literature[74]. As such, it may not issue decisions that fill in where a statutory provision is lacking or draw the scope of repeal in such a way as to give the remainder of the law a (changed) meaning that appears to be no longer in line with the intention of the legislator.[75] Accordingly, the Constitutional Court repeatedly emphasizes in its rulings that it is not a "positive legislator". This understanding has (in particular) impacts in terms of the scope of (substantive) review of a legal norm and – in the event that the norm is found to be unlawful –

[71] *Grabenwarter/Frank*, B-VG (2020) Article 1, point 5.

[72] As regards the (wide) margin of appreciation accorded in agricultural law cf. e.g. *VfSlg. 20.032/2015*, in asylum law *VfSlg. 20.286/2018*, in land use planning law *VfSlg. 14.375/1995*, as well as *VfGH 18.9.2014, B 1311/2012*, in employment law for public employees *VfSlg. 16.176/2001, 17.452/2005, 20.073/2016*, and *VfGH 1.7.2022, G 17/2022*, in health law *VfSlg. 20.397/2020*, in civil status law *VfSlg. 20.258/2018*, in social insurance law *VfSlg. 16.007/2000*, as well as *VfGH 6.3.2023, G 296/2022*, in tax law *VfSlg. 19.598/2011, 19.933/2014* and in criminal law *VfSlg. 20.057/2016*.

[73] *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 126, with further references in each case.

[74] Cf. e.g. *Bußjäger*, Art. 140 B-VG, in: Kahl/Khakzadeh/Schmid (eds.), Bundesverfassungsrecht, 2021, point 17; *Öhlinger/Eberhard*, Verfassungsrecht[13], point 1002; *Rohregger*, Art. 140 B-VG, in: Korinek/Holoubek et. al., Österreichisches Bundesverfassungsrecht, 6. Lfg., 2006, point 14 mwN; *Stöger* regarding OGH 31.8.2015, 6 Ob 147/15h, NZ 2015/113, 350.

[75] Cf. *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen als Problem verfassungsgerichtlicher Kontrolle, Austrian National Report for the XIVth Congress of the Conference of the European Constitutional Courts (2008) 11 *f*.

the scope of repeal by the Constitutional Court.[76] Correspondingly, applications for review of legal norms are inadmissible if the scope of the challenged provisions is defined in such a way (in particular if it is drawn too narrowly) that the repeal sought "would mean an impermissible act of positive legislation by the Constitutional Court because repeal of the wording challenged would change the meaning of the law in a manner the legislator did not intend."[77]

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

As regards criminal law, the Constitutional Court accords the legislator a (generally wide) margin of appreciation,[78] including intrusive provisions, which typically occur in criminal law.[79]

In *VfSlg. 20.231/2017*, the Constitutional Court – departing from its established case law – widened the margin accorded to the legislator in connection with the distinction provided for in Austrian law between judicial criminal law enforced by criminal courts (referred to as *gerichtliches Strafrecht*, *Justizstrafrecht* or *Kriminalstrafrecht*) and administrative penal law (*Verwaltungsstrafrecht*), which is enforced at first instance by administrative authorities. In *VfSlg. 20.231/2017*, the Constitutional Court ruled that – contrary to its previous case law – the amount of the penalty for an offence is not a suitable means for distinguishing judicial criminal law from administrative penal law. This grants the legislator a (greater) margin of appreciation when conferring jurisdiction to impose penalties (either on the ordinary courts or on administrative authorities).

Nevertheless, the granting of a margin of appreciation is not associated with any "general principle of deference". Recently, the Constitutional Court has reviewed and repealed as unconstitutional several provisions of criminal (procedural) law.[80] As mentioned above, the Court recently explicitly ruled in its review of the criminal prohibition of any form of assisted suicide that in that case the "margin of appreciation by the legislator is not wide at all".[81]

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The powers of the Constitutional Court are exhaustively stipulated in the Constitution (cf. in particular Articles 137 to 145 of the Constitution). There is no specific jurisdiction relating to secret intelligence matters or matters attributable to state security. Questions connected with e.g. the State Protection Act (*Polizeiliches Staatsschutzgesetz*) are generally deemed justiciable.[82] The non-public deliberations of the Constitutional Court itself are secret. In addition, section 20 of the Constitutional Court Act (*VfGG*) provides that certain court files or parts

[76] Cf., most recently, e.g. *VfGH 6.12.2022, G 221/2022* (repeal of a provision of regional constitutional law for breach of the Federal Constitution).
[77] Cf. e.g. *VfSlg. 12.465/1990*; *VfGH 27.6.2023, G 123/2023*.
[78] *VfSlg. 19.960/2015, 20.057/2016, 20.156/2017*; *VfGH 18.6.2022, G 51/2022*.
[79] *VfSlg. 19.831/2013, 20.213/2017, 20.240/2018*.
[80] Cf. *VfSlg. 20.082/2016* (exemption of former spouse from testifying), *VfSlg. 20.433/2020* (killing on demand); *VfGH 1.12.2022, G 53/2022* (mandatory pre-trial detention in case of a penalty of ten years or more of imprisonment).
[81] *VfSlg. 20,433/2020*.
[82] *VfSlg. 20.213/2017*.

thereof may be excluded from inspection.[83] Personal data of parties to proceedings brought before the Constitutional Court are anonymized prior to publication of the decision.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Generally, the Constitutional Court does not differentiate in its rulings based on the "cause" of any non-compliance of a legal norm with fundamental rights. According to the Court's case law, inadequacies in a legal norm which arise only over time (possibly due to a failure to introduce reforms) can also result in non-compliance of a norm with fundamental rights.[84]

However, a failure to act on the part of the legislator may – in light of the Court's decision-making powers, which permit it (only) to repeal formal laws that have been found to be unconstitutional (Article 140 of the Constitution) – occasionally escape review by the Constitutional Court.[85] The Constitutional Court itself is not permitted to pass legislation or compel the legislator to act, even "if the adoption of certain provisions would seem necessary to ensure compliance with the Constitution".[86] (A similar problem is that of "inactivity" by the administrative authority enacting the regulation in light of the jurisdiction of the Constitutional Court to review the lawfulness of regulations in accordance with Article 139 of the Constitution[87].)

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

No. Differences (and commonalities) regarding the standard of review and degree of deference are related only to (the implementation in practice of) the various powers of the Constitutional Court (see Questions 2., 3. and 4. above).

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How

[83] *VfSlg 16.424/2002* with further references.

[84] E.g. *VfSlg. 12.568/1990* (different retirement ages for men and women), *13.917/1994* (compulsory attendance of a home economics school for girls only), *19.936/2014* (medical staffing), *20.340/2019* (unlawfulness of an ordinance on the posting of printed works for lack of adaptation to changed conditions); *VfGH 14.12.2022, V 177/2022* and others with further references (unlawfulness of a speed limit ordinance due to a change in local conditions).

[85] Cf. *Grabenwarter*, Verfassungsgerichtshof, point 74; *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen.

[86] *Rohregger*, Article 140 B-VG, point 14.

[87] Cf. recently *VfGH 5.12.2022, E 394/2021* (nitrate regulation); for a possible solution to the problem in EU law contexts see *Herbst/Mayrhofer*, Zur Untätigkeit des Verordnungsgebers bei Umsetzung unionsrechtlicher Verpflichtungen, in Wagner et al. (eds.), Liber Amicorum anlässlich des 60. Geburtstages von Wilhelm Bergthaler (forthcoming).

deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

a. In proceedings for review of the constitutionality of laws in accordance with Article 140 of the Constitution, the Constitutional Court does not merely check for possible substantive unconstitutionality, but also examines compliance with the procedural rules for enacting legal norms.[88] In doing so it must review every step in the legislative process.[89] Even violations of rules of procedure of a legislative body which are capable of affecting parliamentary policy-making result in the law being unconstitutional.[90] Any measures undertaken by bodies involved in the legislative process of their own volition for the purpose of decision-making are not subject to the Constitutional Court's powers of review.[91] Likewise, parliamentary discussion of the meaning of proposed legislation is of no legal relevance for the purposes of review of legal norms. Generally speaking, the "quality" of the parliamentary procedure is not an independent criterion for assessing the constitutionality of a law. One specific exception to this are "cooperative" procedures, including in particular procedures regarded as necessary for adopting the Fiscal Equalization Act (*Finanzausgleichsgesetz*) (see 2.c. above).

Existing case law does not require the legislator to justify a measure. The considerations of the legislator included in the preparatory documents (regarding compatibility with fundamental rights, for instance) may of course be of interest to the Court,[92] but they do not prevent the Court from finding an abstract justification for a provision.

b. In proceedings for review of the lawfulness of regulations in accordance with Article 139 of the Constitution, and in particular of regulations which are target-oriented as described above, the Constitutional Court also reviews compliance with the procedure prescribed by statute for determining an adequate basis for decision-making; it must be possible for the Constitutional Court to assess whether a regulation also meets the pertinent statutory objectives (see 2.d. above).[93] In connection with regulations establishing measures to contain the COVID-19 pandemic, the Constitutional Court, as mentioned (2.d. above), requires these circumstances to be documented in the files. A breach by the authority of this documentation requirement renders the regulation unlawful without the Constitutional Court having to scrutinize its actual content.[94]

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[88] *Rohregger*, Article 140 B-VG, in Korinek/Holoubek et al., Österreichisches Bundesverfassungsrecht, 6. Lfg. (2006), point 75.

[89] Cf. e.g. *VfSlg. 4497/1963, 5996/1969, 8466/1978, 16.152/2001, 16.515/2001, 16,848/2003*.

[90] *VfSlg 16.151/2001*.

[91] *Rohregger*, Article 140 B-VG, point 78.

[92] Cf. *VfGH 1.12.2022, G 53/2022*.

[93] *VfSlg. 8280/1978*; cf. as well e.g. *VfSlg. 16.032/2000, 17.015/2003, 20.474/2021*.

[94] Cf. *VfSlg. 20.399/2020, 20.521/2021*; *VfGH 14.6.2022, V 53/2022* (breach of documentation requirement) and conversely *VfSlg. 20.458/2021*; *VfGH 13.6.2023, V 161/2022; 29.6.2023, V 143/2021* (sufficient documentation).

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Democratic legitimacy must be distinguished from the legal compliance of the decisions, the existence of which, insofar as they are decisions in the form of formal federal or regional laws (Article 140 paragraph 1 of the Constitution) or in the form of regulations (Article 139 paragraph 1 of the Constitution), is subject to review by the Constitutional Court. In contrast, other democratically legitimized political decisions are not subject to constitutional court review.[95]

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Constitutional Court is prohibited by the Constitution from giving unconditional weight to the definition of a right or application of that definition to the facts given by e.g. the Federal Government. Nevertheless, the observations of the Federal Government and the statements of other parties to proceedings before the Constitutional Court may be of interest in review proceedings.[96] Furthermore, the Constitutional Court may endorse observations submitted in the proceedings.[97]

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The degree of deference may vary depending on the structural nature of the fundamental right concerned and the nature and substance of interference with the right.[98] A good example of this, as regards proceedings for review of the constitutionality of laws, is the fundamental right to engage in gainful activity (Article 6 of the Basic State Law [*StGG*]), where the Constitutional Court accords the legislator a wider margin with regard to provisions governing exercise of a profession or occupation in general than those relating to entry into a profession or occupation (see 2.c. above).

When examining whether a judgment (or decision) of an administrative court infringes a constitutionally guaranteed right (Article 144 of the Constitution), a general distinction can be drawn between a "basic review" as the rule, and a "detailed review" as the exception. The Constitutional Court carries out a "detailed review" in the case of fundamental rights that need to be specified in more detail by law (*Ausführungsvorbehalt*) (see point 54 above). The Court also tends to carry out a "detailed review" in cases concerning fundamental procedural rights.[99] In the case of the fundamental right to protection of personal freedom, the Court carries out a

[95] *Korinek*, Verfassungsgerichtsbarkeit 257 with further references; see above 12. bis 15. a.
[96] Cf. *VfGH 16.6.2023, G 85/2021, V 116/2021*; *13.6.2023, V 161/2022*; *5.10.2022, G 141/2022*; *29.9.2022, V 110/2022*; cf. also Questions 12 and 14.
[97] Cf. *VfGH 28.6.2023, G 299/2022* and others, *V 20/2023* and others; *VfSlg. 20.412/2020, 17.967/2006, 14.260/1995*.
[98] Cf. e.g. *Öhlinger/Eberhard*, Verfassungsrecht[13], point 734.
[99] *VfSlg. 19.960/2015, 19.970/2015, 20.183/2017, 20.271/2018, 20.314/2019, 20.454/2021*; *VfGH 24.11.2017, E 2845/2017*; *6.10.2021, E 3811/2020* and others.

"basic review" which, due to existing detailed constitutional provisions relating to this fundamental right (in the Federal Constitutional Law of 29. November 1988 on the Protection of Personal Freedom [*Bundesverfassungsgesetz vom 29. November 1988 über den Schutz der persönlichen Freiheit*]) frequently amounts to a "detailed review".[100] As already mentioned (see 2.c.), the spectrum of deference may rather depend on the subject matter at hand and less on fundamental rights' peculiarities.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court determines whether a provision can be interpreted in various ways on a case-by-case basis. When determining the meaning of the law, all available methods of interpretation must be exhausted. Only if, after all methods of interpretation have been applied in a specific case, the meaning of a provision still remains unclear, are the rule-of-law requirements violated.[101] E.g. in *VfSlg. 12.420/1990*, the Constitutional Court justified the repeal of a provision of a regulation granting unemployment assistance as unlawful as follows: "Only with subtle expertise, extraordinary methodological skills and a certain desire to solve mental exercises can it be understood at all what orders are to be made here."

The *acte clair* doctrine as such is relevant when reviewing the constitutionality of laws (only) if the conflict between an Austrian provision and a (directly applicable) provision of EU law is obvious. A possible (but not inevitable) consequence is that the national provision is not applicable (*präjudiziell*) for the purposes of Article 140 paragraph 1 of the Constitution and so cannot undergo review of constitutionality.[102]

20. What is the intensity review of your Court in case of the legitimate aim test?

When reviewing whether a provision serves the public interest, the Constitutional Court usually applies a test of reasonableness only.[103] The Court grants the legislative territorial entities a relatively wide margin of appreciation in this regard. In particular, the Constitutional Court is not required to assess whether pursuit of a particular objective is appropriate on economic or social policy grounds. It can oppose the legislator only if the legislator pursues objectives which cannot be regarded as being in the public interest under any circumstances.[104]

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

22. Does your Court go through every applicable limb of the proportionality test?

The Constitutional Court applies all elements of the "classic" proportionality test shaped by the case law of the German Federal Constitutional Court and by the ECtHR. A kind of turning point in the case law of the Austrian Constitutional Court came about with the judgment in

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[100] *Öhlinger/Eberhard*, Verfassungsrecht[13], point 855; *VfSlg. 13.893/1994, 13.914/1994, 17.891/2006, 18.058/2007, 18.081/2007, 19.968/2015*.

[101] *VfSlg. 8395/1978, 11.639/1988, 14.644/1996, 15.447/1999, 16.137/2001, 20.070/2016*.

[102] Cf. *VfSlg. 15.368/1998, 16.293/2001*; *VfGH 12.12.2018, G 104/2018* and others.; on review proceedings of regulations in accordance with Article 139 paragraph 1 of the Constitution cf. *VfSlg. 17.560/2005*.

[103] *Öhlinger/Eberhard*, Verfassungsrecht[13], point 716; cf. also the responses to Questions 4., 12. and 14.

[104] *VfSlg. 9911/1983, 12.094/1989, 19.933/2014, 20.285/2018*.

VfSlg. 10.179/1984 concerning the Scrap Metal Act (*Schrottlenkungsgesetz*), which marked the beginning of the application of the proportionality test by the Constitutional Court.[105] In accordance with the case law that began with this judgment, restrictions on fundamental rights are lawful only if they serve the public interest, are suitable and necessary for the achievement of an objective in the public interest, and if there is a reasonable relationship between the public interest and the curtailed fundamental right aspect.[106] The legal wording developed by the Constitutional Court in connection with the proportionality test and used in the case law reflects those stages, but is specific to the fundamental right concerned. As regards freedom of expression (Article 10 ECHR), to give an example connected with a right as defined in the European Convention of Human Rights (ECHR), the Constitutional Court uses the following wording:

"A constitutionally justified interference with freedom of expression must therefore – in line with rulings of the European Court of Human Rights (see e.g. ECtHR 26.4.1979, *Sunday Times v. United Kingdom*, EuGRZ 1979, 390; 25.3.1985, *Barthold v. Germany*, EuGRZ 1985, 173) – be prescribed by law, pursue one or more of the legitimate aims specified in Article 10 (2) ECHR and be 'necessary in a democratic society' for achieving this aim or these aims".[107]

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No. However, the Constitutional Court does not always align its reasoning with the "classic" scheme and sometimes "skips" individual stages of the test.[108] Occasionally, it makes a general assessment that a provision is proportional.[109]

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

28. Has your Court have grown more deferential over time?

"In comparison with other European countries, the ECHR and ECtHR case law are of utmost significance in Austria".[110] This is due firstly to the position of the ECHR in the Austrian legal system: as part of constitutional law, it is applied as a direct standard of review by the Constitutional Court.[111] The rights enshrined in the ECHR can be asserted before the Constitutional

[105] Cf. *Grabenwarter*, Verfassungsgerichtshof, point 118.
[106] On public interest cf. e.g. *VfSlg. 12.094/1989, 20.032.2015, 20.089/2016, 20.268/2018*; on suitability cf. e.g. *VfSlg. 13.725/1994, 20.202/2017*; *VfGH 27.6.2023, E 1517/2022*; on necessity cf. e.g. *VfSlg. 17.817/2006, 19.722/2012, 20.073/2016, 20.475/2021*; on adequacy cf. e.g. *VfSlg. 11.853/1988, 18.115/2007, 20.398/2020*.
[107] *VfSlg. 20.014/2015*; *VfGH 24.2.2021, E 607/2021*; *27.9.2021, E 4337/2020*; *8.3.2022, E 3120/2021*; *19.9.2022, V 183/2021*.
[108] See *Öhlinger/Eberhard*, Verfassungsrecht[13], point 717; cf. e.g. *VfSlg. 19.624/2012, 20.181/2017, 20.261/2017*.
[109] Cf. e.g. *VfSlg. 13.330/1993, 13.659/1993*.
[110] *Grabenwarter*, Verfassungsgerichtshof, point 123; for more detail see *Grabenwarter*, Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes, JRP 2012, 298 (298 *ff*.).
[111] *Grabenwarter*, Verfassungsgerichtshof, point 123.

Court as constitutionally guaranteed rights under the Constitution.[112] In addition, the case law of the Court demonstrates a high degree of willingness to take account the jurisprudence of the European Court of Human Rights.[113]

In the late 1980s, the Constitutional Court began to adopt the concept of margin of appreciation developed in the case law of the bodies of the ECHR as *Gestaltungsspielraum*[114] and continues to use it today.[115] The Constitutional Court has repeatedly emphasized that the Austrian *rechtspolitischer Gestaltungsspielraum* should be understood as being synonymous with "margin of appreciation".[116] It sometimes extends the margin to national fundamental rights.[117] This may appear to be obvious given the constitutional status of the ECHR in Austria, but the different approaches of the doctrines involved mean that this is by no means self-evident, because *rechtspolitischer Gestaltungsspielraum* depends on the extent to which the legislator is bound by the Constitution, while the margin of appreciation is primarily connected to the allocation of powers between the ECtHR and the bodies of the Convention state.[118]

The judicial review carried out by the Constitutional Court has become much more intense over recent decades, particularly as regards fundamental rights jurisprudence.[119] This is also due to factors including the influence of the fundamental rights set out in the ECHR (and its protocols) and the related case law of the ECtHR.[120] In Austria, therefore, establishment of the test of proportionality in the case law of the Constitutional Court, which is closely interwoven with the jurisprudence of the European Court of Human Rights in Strasbourg, does not coincide with the development of the principle of judicial deference; rather, it is a key element of a development in jurisprudence that has been leading away from a restrictive form of judicial self-restraint since the early 1980s.[121] In only 113 cases between 1947, when the Constitutional Court resumed its activities, and the end of 1979 did the Court find in proceedings reviewing the constitutionality of laws that a fundamental right had been infringed.[122] Since then, i.e. in the last 42 years, the Constitutional Court has found fundamental rights infringements in approximately 700 cases.

It is worth mentioning in this connection that the Constitutional Court – finally – put an end to the practice of the constitutional legislator (which had continued well into the 1990s) of re-

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[112] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention[7] (2021) § 3 point 2.
[113] Cf. recently e.g. *VfSlg. 20.394/2020, 20.509/2021*; *VfGH 7.12.2022, E 2303/2021*; *14.12.2022, E 1487/2022* and others; *29.6.2023, V 143/2023*.
[114] *Dopplinger/Mörth*, Gestaltungsspielraum 241, 244.
[115] Cf. *VfSlg. 12.103/1989, 19.904/2014, 20.258/2018, 20.286/2018, 20.334/2019*.
[116] *VfSlg 20.179/2017, 20.180/2017*; cf. *VfSlg 16.911/2003, 20.089/2016*.
[117] Cf. *VfSlg. 20.089/2016, 20.179/2017, 20,180/2017*.
[118] Cf. *Dopplinger/Mörth*, Gestaltungsspielraum 261.
[119] Cf. in particular the current findings by *Eberhard*, Judicial activism 150.
[120] For the first few decades cf. in particular *Novak*, Verhältnismäßigkeitsgebot und Grundrechtsschutz, Festschrift für Günther Winkler (1989) 39 *ff*.
[121] Cf. *Eberhard*, Judicial activism 148 *f.*; *Rohregger*, Article 140 B-VG, point 7.
[122] *Öhlinger*, Die Grundrechte in Österreich, EuGRZ 1982, 216 (244). *Korinek* stated as late as 1980 that the Constitutional Court was regularly criticized in the literature for being too reserved, especially with regard to substantive questions of constitutional interpretation, and thus for practicing a pronounced judicial self-restraint; in its most recent case law, however, examples of a more substantive emphasis on constitutional jurisdiction were evident (Verfassungsgerichtsbarkeit 262).

enacting as constitutional provisions enshrined in ordinary laws which had been ruled unconstitutional by the Constitutional Court.[123] In a decision on a procurement law provision which had been "immunized", and thus exempted from review of the Constitutional Court in this way,[124] the Court found this constitutional provision, specifically its adoption without a mandatory referendum in this case of a so-called "overall amendment" of the Constitution, to be in breach of the fundamental rule of law principle of the Federal Constitution.[125] Since this judgment, it has been established that the Constitutional Court may review not only ordinary laws, but also (federal) constitutional law and, if it has been adopted in violation of the constitution, may repeal it as unconstitutional.[126]

The transformation in fundamental rights jurisprudence, which had begun in 1958 with Austria's accession to the ECHR, intensified with Austria's accession to the European Union in 1995 and the "dialogue" between the Constitutional Court and the CJEU initiated at that point and was later broadened and intensified when the CFR attained the status of primary law.[127] One milestone in this development, which contributed to further focus on the proportionality test at the expense of the margin of appreciation,[128] was the recognition of CFR rights as constitutionally guaranteed rights and thus a standard of review (also) for the Constitutional Court.[129] The principle of proportionality, which is explicitly provided for in Article 52 paragraph 1 CFR, plays a key role in the interpretation of the Charter rights, and the Constitutional Court uses the case law of the ECtHR as an aid to interpretation of those rights. As clearly demonstrated in *VfSlg. 19.632/2012*, the Constitutional Court uses the principle of proportionality as kind of a gateway for the case law of the ECtHR by reference to which (in the specific case) it reviewed the proportionality of restrictions on the conduct of oral hearings.[130]

At the same time, however, the increasing recognition and differentiation of a "division of responsibilities" of the courts in the multilevel constitutionalism in Europe also represents a reverse trend, described elsewhere in this report (above 19.). In the first few years following EU accession, the Constitutional Court regarded the national legislator as being subject to a comprehensive "*twofold tie*" – to EU law on the one hand and to Austrian constitutional law on the other,[131] a situation referred to in the literature even as a "clear case of judicial activism".[132] The Court has since modified this twofold-tie principle to a significant extent and reduced the relevance of the Constitution and thus its role in cases in which a provision of EU law fully determines the meaning of the national provision implementing it.

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[123] Cf. *Grabenwarter*, Verfassungsgerichtshof, point 102.

[124] The constitutional provision specified in section 126a of the Federal Procurement Act (*Bundesvergabegesetz*), Federal Law Gazette (*BGBl.*) I 56/1997 as amended by Federal Law Gazette I 125/2000, declared all provisions of regional law concerning legal protection bodies in procurement law in force on 1 January 2001 to be "not contrary to the Federal Constitution".

[125] *VfSlg. 16.327/2001*; cf. also *VfSlg. 15.888/2000*.

[126] On the federal unconstitutionality of regional constitutional law cf. *VfGH 6.12.2022, G 221/2022*.

[127] *Eberhard*, Judicial activism 149; *Grabenwarter*, Verfassungsgerichtshof, point 125 *ff*.

[128] *Rohregger*, Article 140 B-VG, point 7.

[129] Essentially *VfSlg. 19.632/2012*; see also *VfSlg. 20.394/2020* as well as *VfGH, 28.2.2023, G 241/2022*; *15.3.2023, E 4001/2021*.

[130] Cf. *Grabenwarter*, Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte – am Beispiel des Falls M. gegen Deutschland, Juristen Zeitung 2010, 857 *ff*, re the similar approach taken by the German Federal Constitutional Court when interpreting the fundamental rights set out in the Basic Law.

[131] VfSlg. 14.863/1997, 17.967/2006, 18.642/2008, 19.529/2011.

[132] *Eberhard*, Judicial activism 149.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

No. In its judgment of 7 December 2006, application no. 37301/03, *Hauser-Sporn v. Austria*, the ECtHR found, in essence, that contrary to Article 13 ECHR, the applicant had no domestic remedy in administrative penal proceedings, including a complaint to the Constitutional Court under Article 144 of the Constitution, whereby he could effectively enforce his right to a hearing within a reasonable time. The Constitutional Court's refusal to deal with the complaint did not result from "judicial deference", however.[133]

IV. Other peculiarities

29. Does the deferential attitude depend on the case load of your Court?

No.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

See Question 11.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

In proceedings for review of rulings by an administrative court (Article 144 of the Constitution), the Constitutional Court must *ex officio* respond to concerns relating to a provision which arise in the course of those proceedings, even if the provision concerned was not challenged by the complainant. In particular procedural situations, including in proceedings for review of a legal norm initiated on application, the Court may be placed in the position of having to review *ex officio* a provision which has not been challenged.[134]

[133] Cf. e.g. *VfSlg. 18.642/2009, 19.702/2012, 20.070/2016, 20.209/2017, 20.522/2021* as well as *VfGH 14.12.2022, G 287/2022* and others.
[134] Cf. e.g. *VfSlg. 7382/1974, 14.709/1996*.